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In the Court of Criminal Appeals of Texas

WALTER FISK,
Appellant
v.
THE STATE OF TEXAS,
Appellee

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COURT OF CRIMINAL APPEALS
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State's Reply Brief on the Merits
from the
Fourth Court of Appeals, San Antonio, Texas,
No. 04-17-00174-CR
Appeal from Bexar County

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IDENTITY OF TRIAL JUDGE, PARTIES, AND COUNSEL

The trial judge below was the **Honorable Kevin M. O'Connell**, Presiding Judge of the 227th Judicial District Court, Bexar County, Texas.

The parties to this case are as follows:

1) **Walter Fisk** was the defendant in the trial court and appellant in the court of appeals, and he is the respondent to this Honorable Court.

2) **The State of Texas**, by and through the Bexar County District Attorney's Office, prosecuted the charges in the trial court, was appellee in the Court of Appeals, and is the petitioner to this Honorable Court.

The trial attorneys were as follows:

1) Walter Fisk was represented by **Jesse Hernandez**, 7143 Oaklawn Drive, San Antonio, TX 78229, and **John Paul Young**, P.O. Box 700713, San Antonio, TX 78270.

2) The State of Texas was represented by **Nicholas "Nico" LaHood**, District Attorney, and **Anna Scott**, **Sade Mitchell**, and **Andrew Warthen**, Assistant District Attorneys, Paul Elizondo Tower, 101 W. Nueva Street, San Antonio, TX 78205.

The appellate attorneys are as follows:

1) Walter Fisk is represented by **Michael Robbins**, Assistant Public Defender, Paul Elizondo Tower, 101 W. Nueva Street, Suite 310, San Antonio, TX 78205.

2) The State of Texas is represented by **Nicholas "Nico" LaHood**, District Attorney, and **Andrew N. Warthen**, Assistant District Attorney, Paul Elizondo Tower, 101 W. Nueva Street, San Antonio, Texas 78205.

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STATEMENT OF THE CASE

The State incorporates the Statement of the Case from its original brief.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was requested and granted.

ISSUES PRESENTED

1. The current test for determining whether an out-of-state offense is substantially similar to an enumerated Texas offense is too broad. Accordingly, this Court should disavow that test and replace it with one that only compares the elements of the respective offenses.

2. Even if not disavowed, the court of appeals misapplied the current test when it concluded that the military's former sodomy-with-a-child statute is not substantially similar to Texas's sexual-assault statute.

STATEMENT OF FACTS

The State incorporates the Statement of Facts from its original brief.

ARGUMENT

The State reiterates its arguments from its original brief. This reply is to supplement that brief in order to address several of appellee's contentions.

I. The effect of § 1.02 on § 12.42's substantial-similarity provision.

When determining what constituted substantially similar elements, as that phrase is used in § 12.42 of the Penal Code, the *Prudholm* Court looked to § 1.02 for guidance. *Prudholm v. State*, 333 S.W.3d 590, 594-95 (Tex. Crim. App. 2011). Appellant urges this Court to continue to utilize § 1.02 in the manner the *Prudholm* Court did. But, for the reasons outlined below, it should not.

a. Section 1.02 does not give license to expand § 12.42's plain language

Section 1.02 generally sets out the objectives of the Penal Code, and states that construing the Code's provisions should be done to achieve the stated objectives. Tex. Penal Code Ann. § 1.02. Subsection (3)—the provisions relied upon in *Prudholm*—states that one of the objectives is "to prescribe penalties that are proportionate to the seriousness of offenses and that permit recognition of differences in rehabilitation possibilities among individual offenders[.]" *Id*. § 1.02(3). The *Prudholm* Court took this to mean that when Texas courts compare an out-of-state offense to a Texas offense, it must also consider "the individual or public interests protected and the impact of the elements on the seriousness of the offenses." *Prudholm*, 333 S.W.3d at 595.

Prudholm's rule, however, is contrary to § 12.42's plain language. In relevant part, § 12.42 states that a defendant shall be punished by imprisonment for life if he is convicted of a listed offense and he has been previously convicted of an offense "under the laws of another state containing *elements* that are substantially similar to the *elements* of an [enumerated] offense . . . ." Tex. Penal Code Ann. § 12.42(c)(2) (emphasis added).

It is true that § 1.02(3)'s stated objective is "to prescribe penalties that are proportionate to the seriousness of offenses[,]" but § 12.42(c) already prescribes a very specific penalty, namely, life imprisonment. The legislature determined that if certain offenders already committed an enumerated offense, or an out-of-state offense with substantially similar elements to an enumerated offense, then life imprisonment is a proportionate penalty. The purpose or punishment of the out-of-state offense is irrelevant.

And relying on § 1.02(3) when construing § 12.42(c) the way that the *Prudholm* Court did creates certain interpretive inconsistencies. For instance, suppose an offense enumerated under subsection (c)(2)(B) is a third-degree felony,[1] and an offender commits it and is sentenced accordingly. Later, the legislature increases the offense to a second-degree felony. Thereafter, the offender commits a listed offense under subsection (c)(2)(A), and the State seeks

[1] For example, § 25.02 of the Penal Code, an enumerated offense, is generally a third-degree felony. Tex. Penal Code Ann. § 25.02(c).

an automatic life sentence because of his previous conviction for an enumerated offense. Does the punishment court have to take into account the fact that the punishment was once lower when assessing an automatic life sentence? Of course not. It is irrelevant what an enumerated offense's punishment degree and range once was. It only matters that it is enumerated in § 12.42(c)(2)(B).

Likewise, it is irrelevant what an out-of-state offense's punishment degree or range is. The statute is only concerned with whether the elements are substantially similar to those in the enumerated Texas offenses. That is especially important in cases like this one, where the out-of-state statute may have had a much lower punishment range than it does now. And this is key, because Texas is not concerned with how serious another jurisdiction thought a particular crime was in the past. Instead, Texas is concerned with punishing people who repeatedly commit certain sex crimes—regardless of whether those crimes were committed here or somewhere else.

Moreover, if the interests protected are to be considered, does the State have to prove that an offender committed an enumerated offense in accordance with the objectives the legislature had in mind when the statute was enacted? For instance, suppose an offender was previously convicted for violating § 43.25, the sexual-performance-of-a-child statute, an enumerated offense. Later, he commits a listed offense, and the State seeks to have his punishment enhanced to life imprisonment

because of his § 43.25 conviction. If he violated § 43.25 because he was trying to make a statement about the sexualization of children by society rather than to satisfy prurient interests, does that matter? No, because the legislature's purposes behind the offenses enumerated in subsection (c)(2)(B) are completely irrelevant when seeking to impose a life sentence for a violation of an offense listed in subsection (c)(2)(A). The only thing that matters at that point is that the offender was previously convicted of the enumerated offense.

There is no reason it should be any different for out-of-state offenses with substantially similar elements. The interests being protected by the out-of-state legislature are of no import. Rather, Texas has decided that such crimes are heinous and that a person who commits such offenses will continue to pose a danger to society, mandating a life sentence.

Plainly, there is no reason why § 1.02 should be used to expansively construe the "substantially similar" provision of § 12.42, but not the other portions of that statute. The legislature simply wanted the elements of out-of-state offenses to be compared, and wrote the enhancement statute accordingly. It does not undermine the objectives of the Penal Code to implement what the legislature has mandated through the language it actually used.

b. The interests underlying military offenses offer a perfect example of why the current test goes too far

In his response, appellant notes that one of the purposes of the punitive portions of military law is to help secure the nation's defense. (Appellant's Br. 11.) That is certainly true. There can be no doubt that the military has an interest in removing from its ranks service members who would engage in immoral and deviant conduct, and that the nation is better secured as a result.

But the fact that the military is better served by, and therefore has a strong interest in, ridding the armed forces of criminals should have no bearing on the fact that Texas considers certain sex offenders to be so dangerous that it has mandated a life sentence if they commit certain other sex crimes. In fact, if the military's *only* purpose in prosecuting criminals was to safeguard the nation, that would still not change the fact that Texas's focus is on safeguarding the public from such offenders.

Furthermore, all military offenses are designed, in one form or another, to protect the nation. By appellant's logic—namely, that such a purpose necessarily makes military offenses substantially different from Texas offenses—no military offense could ever be used to enhance a sentence under § 12.42(c). If that were the case then why would this Court have decided that such offenses qualify as "laws of another state" in *Rushing v. State*, 353 S.W.3d 863 (Tex. Crim. App. 2011)? That decision would have been pointless if the national-security interest which imbues

every military offense rendered them incapable of being substantially similar.

Rather, it is not the interests of other jurisdictions that Texas is concerned with. Instead, Texas is interested in seeing dangerous sex offenders severely punished if they continue to sexually abuse its residents. The safeguard to defendants that Texas has put in place when utilizing out-of-state convictions is that the *elements* must be substantially similar. No further inquiry into an out-of-state offense is required.

c. The Purdholm test also ignores § 1.07(22) of the Penal Code

As discussed, *Prudholm* focused on § 1.02(3) when interpreting substantial similarity. But it only paid lip service to another relevant Penal Code section, that is, § 1.07(22), which defines the phrase "element of offense." *Prudholm* only mentioned that definition in a footnote. *Prudholm*, 333 S.W.3d at 594 n.19. But that definition completely undermines the concept of looking to interests and impacts when comparing out-of-state offenses to the enumerated offenses.

"Element of offense" means the forbidden conduct, the required culpability, any required result, and the negation of any exception to the offense. Tex. Penal Code Ann. § 1.07(22). As stated above, § 12.42 allows enhancement of a sentence if an offender has previously been convicted "under the laws of another state containing elements that are substantially similar to the *elements of an offense* listed in Subparagraph (i), (ii), (iii), or (iv)." Tex. Penal Code Ann. §

12.42(c)(2)(B)(v) (emphasis added).

Since a phrase defined by § 1.07(22) is used in § 12.42, courts should use that meaning when construing that statute. The "forbidden conduct" refers to the actions one must take to commit any given offense. The "required culpability" means the mental state. *See* Tex. Penal Code Ann. § 6.03. "[A]ny required result" is obviously referencing result-oriented crimes where the result must also be proven, e.g., murder. And "negation of any exception to the offense" deals with those offenses where the State has to prove an exception listed in the charging document does not apply. *See* Tex. Penal Code Ann. § 2.02. Nowhere in § 1.07(22) does it refer to, or even allude to, "the individual or public interests protected and the impact of the elements on the seriousness of the offenses." *Prudholm*, 333 S.W.3d at 595. Thus, this is just another instance where *Prudholm*'s expanded test goes beyond the Penal code's plain language, and nowhere does § 1.02 give license to deviate from the Code's plain language.

II. *Stare decisis*.

Appellant emphasizes that the principle of *stare decisis* weighs against circumscribing the test outlined in *Prudholm* and its progeny. And, to be sure, appellant's point is well founded because "[t]his Court does not lightly overrule precedent." *State v. Medrano*, 67 S.W.3d 892, 901 (Tex. Crim. App. 2002).

But, overruling precedent is not without precedent. If a previous decision "was poorly reasoned or is unworkable" then this Court has been willing to dispense with its prior holdings and begin anew. *Id*. (quoting *Paulson v. State*, 28 S.W.3d 570, 571 (Tex. Crim. App. 2000)).

a. Prudholm was wrongly decided and has proved unworkable

As explained in the State's original brief and above, *Prudholm* and the cases that relied upon it were wrongly decided in the first instance. The *Prudholm* test does not comport with the plain language, or even the purpose, of § 12.42's auto-life provision.

But it is also proven to be unworkable, and this case offers a perfect example why. The court of appeals emphasized that the purpose behind sodomy statutes was to protect against "the nonprocreative sexual activity the government deemed unnatural . . . ." *Fisk v. State*, 538 S.W.3d 763, 775 (Tex. App.—San Antonio 2017, pet granted). As explained in the State's original brief, the idea that the military prohibited sodomizing children because it was worried about children not

procreating is absurd in the extreme. But even if that were the sole purpose behind the military's prohibition on child sodomy, that is clearly not what *this state* is concerned with. Why the military sought to punish child sodomy, or what punishment it saw fit to impose, is irrelevant to this state's punishment scheme. What is relevant is that the legislature wanted to see serial perpetrators of sex crimes behind bars for life.

It is also almost impossible to truly discern the purpose behind any given statute, particularly out-of-state statutes. A statute may have many different purposes. As explained above, military offenses are obviously designed to help provide for the nation's defense. That does not mean they are not also designed to protect victims. What an out-of-state legislature was trying to achieve should be of no concern. The only concern should be determining if the elements substantially match, which is discernible from the statutes themselves.

Determining whether punishments are substantially similar would generally be easier because they are typically set by statute. However, that too is not always so straight forward. For instance, Texas's sexual-assault statute involves an enhancement depending on the marital status of the perpetrator or victim. Tex. Penal Code Ann. § 22.011(f); *see also Estes v. State*, No. PD-0429-16 2018, Tex. Crim. App. LEXIS 133 (Tex. Crim. App. May 9, 2018). Should that enhancement be considered when comparing § 22.011 to the out-of-state offense's punishment,

as appellant argues, or should it only be a factor if the out-of-state conviction shows it was applicable? The answer is that it should not be considered at all because the punishment one can receive has no bearing on the elements of the offense. But the fact that there would be confusion shows how unworkable the test is.

Moreover, punishment ranges greatly vary from state to state. In Texas, the punishment range for a first-degree felony is 5-99 or life. That is a huge range. Another state may decide instead to have many different punishment ranges which are much shorter in duration. But the idiosyncrasies of how states punish offenses should not come into play when Texas is simply interested in making sure repeat sex offenders are punished and kept from the public.

Appellant states, "simply because [the *Purdholm* test] may not work to the State's advantage in this case does not suddenly render it 'unworkable.'" (Appellant's Br. 12.) But, the truth is, in many instances the State will simply not bother trying to enhance a sentence based on an out-of-state conviction because it is too difficult to determine what another state's purpose was, or how an offense would be punished in that jurisdiction. And, frankly, if a man who was previously convicted of sodomizing a child is not eligible for a life sentence pursuant to the very statute designed to impose such a sentence, then the precedent certainly has proven unworkable.

b. Legislative reenactment and acceptance of § 12.42 is not dispositive

Finally, this Court has stated, "Certainly when a legislature reenacts a law using the same terms that have been judicially construed in a particular manner, one may reasonably infer that the legislature approved of the judicial interpretation." *Medrano*, 67 S.W.3d at 902. And, while there is some force "to the argument that if a legislature does not agree with the judicial interpretation of the words or meaning of a statute, the legislature would surely have immediately changed the statute," *id*., this Court should not place on the legislature's shoulders "'the burden of the Court's own error.'" *Id*. (quoting *Shivers v. State*, 574 S.W.2d 147, 150 (Tex. Crim. App. 1978) (Dally, J., concurring)).

Since *Prudholm* was decided, the legislature has amended § 12.42 several times without changing the "substantially similar" provision. But that does not necessarily mean that it approved of this Court's interpretation. As Justice Scalia once noted, legislative failure to act might represent approval of the status quo, but it also could just as easily represent an inability to agree upon how to alter the status quo, unawareness of the status quo, indifference to the status quo, or even political cowardice. *Johnson v. Transportation Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting). Thus, the better course of action is to dispense with *Prudholm*'s erroneous and unworkable expanded test, and instead look to the words that it actually used.

The State takes other issues with appellant's response but will not belabor this Court with every particular. Instead, it re-urges the arguments from its original brief with the additional comments above.

PRAYER FOR RELIEF

Counsel for the State prays that this Honorable Court REVERSE the court of appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Andrew N. Warthen, hereby certify that the total number of words in this brief is 2,592. I also certify that a true and correct copy of this brief was emailed to respondent Walter Fisk's attorney, Michael D. Robbins, Assistant Public Defender, at mrobbins@bexar.org, and to Stacey Soule, State Prosecuting Attorney, at information@spa.texas.gov, on this the 17th day of May, 2018.

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